IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 8, 2008 Session

CITY TOWING & TRANSPORT, INC. v. TRANSPORTATION LICENSING COMMISSION OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

Appeal from the Chancery Court for Davidson County
No. 06-489-I Walter C. Kurtz, Judge

No. M2007-01246-COA-R3-CV - Filed February 3, 2009

Towing operator appeals the trial court's refusal to disturb revocation of its license by a local administrative board. Applying the standard applicable to common law writ of certiorari, we affirm the trial court. Further, as to the appellant's arguments, we find that the record was adequate, the revocation was not disproportionate or unreasonable, and the local towing regulations at issue were not preempted by 49 U.S.C. § 14501(c).

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

PATRICIA J. COTTRELL, P.J.,M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ., joined.

Phillip L. Davidson, Nader Baydoun, Stephen C. Knight, Nashville, Tennessee, for the appellant, City Towing & Transport, Inc.

Kevin C. Klein, Andrew David McClanahan, Rita Roberts-Turner, Nashville, Tennessee, for the appellee, Transportation Licensing Commission of the Metropolitan Government of Nashville and Davidson County.

OPINION

This appeal arises from an action by the Transportation Licensing Commission of the Metropolitan Government of Nashville and Davidson County ("Commission") to revoke the towing license of City Towing and Transport, Inc. ("City Towing"). The trial court's dismissal of City Towing's common law certiorari petition seeking review of the Commission's decision is the subject of this appeal.

Metro Code § 6.80.020 requires that all wreckers, towing services, or wrecker services doing business in the metropolitan area be licensed. Furthermore, each wrecker operated by a licensed towing service must obtain a permit after passing a safety inspection. Metro Code § 6.80.210. In order to conduct towing where the consent of the owner is not required in specific emergency types of situations, a license for emergency wrecker services is required. Metro Code § 6.80.515. The Commission is responsible for issuing towing licenses and wrecker permits if it is satisfied that various regulatory requirement have been met. In the event the Commission finds that a licensee has violated provisions of the Metro Code governing towing, the Commission is authorized, after notice and a hearing, to assess monetary penalties, probation, suspension or revocation of a license.[1] Metro Code § 6.80.585.

The record made before the Commission contains the following facts which are not in dispute. Following a hearing, on September 27, 2005, City Towing was placed on probation for two separate violations of Metro Code § 6.80.175[2] which requires that within one hour of a non-consent tow, the towing company must report the tow to the Metropolitan Police Department. A hearing on a third violation of the same regulation was continued and heard on October 25, 2005. The Commission found City Towing in violation of § 6.80.175 for a third time and placed City Towing on probation for six months.[3]

As part of these proceedings placing City Towing on probation for violation of Metro Code § 6.80.175, the Commission also placed City Towing on notice that the license of City Towing would be revoked if it committed "similar offenses." City Towing did not appeal the Commission's findings of these violations.

Thereafter, on January 24, 2006, City Towing was charged with three (3) more violations of Metro Code provisions governing towing. The Commission's decision on these three (3) violations is the subject of this appeal. One charge involving unlawful cruising was dropped. After a hearing, the Commission found City Towing failed to display a current wrecker permit required by Metro Code § 6.80.230[4] and failed to display the amount of the drop fee ($35.00) if the owner appears prior

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[1]Metro Code §6.80.320 provides that if employees violate applicable regulations, those acts by employees constitute cause for probation or revocation of the license of the towing service.

[2]Metro Code § 6.80.175 provides as follows:

> The towing of any vehicle without the consent of the owner must be reported to the metropolitan police department within one hour of the completion of the towing of the vehicle.

[3]For each violation, City Towing was placed on probation for 60 days with the terms to run consecutively resulting in the six (6) month probationary period.

[4]Metro Code § 6.80.230(C) provides in pertinent part as follows:

(continued...)

to towing in violation of Metro Code § 6.80.550.[5] As a result, the Commission revoked City Towing's license for violation of these Metro Code provisions.

City Towing challenged the Commission's decision to revoke its license by filing a Petition for Writ of Certiorari on February 24, 2006. The trial court granted the petition, for purposes of bringing up the administrative record, and the record of the Commission's proceeding was filed with the court. In a thorough twenty-page opinion the trial court upheld the Commission's decision revoking City Towing's license.

City Towing filed this appeal challenging the Chancery Court decision on four grounds: (1) the record before the Commission was insufficient, (2) the trial court misinterpreted the Commission's revocation warning, (3) the trial court erroneously found the Commission's revocation decision was not inappropriate, and (4) federal law preempts the Metro Code in this particular area of the law.

I. STANDARD OF REVIEW

The grounds for relief under a writ of certiorari are quite limited. Review is limited to whether the inferior board or tribunal (1) has exceeded its jurisdiction, or (2) has acted illegally arbitrarily or fraudulently. *Harding Academy v. Metropolitan Government of Nashville and Davidson County*, 222 S.W.3d 359, 363 (Tenn. 2007); *McCallen v. City of Memphis*, 786 S.W.2d 633, 638 (Tenn. 1990); *Turner v. Board of Paroles*, 993 S.W.2d 78, 80 (Tenn. Ct. App. 1999). The reviewing court may not (1) inquire into the intrinsic correctness of the lower tribunal's decision, (2) reweigh the evidence, or (3) substitute its judgment for that of the lower tribunal. *Harding Academy*, 222 S.W.3d at 363. Thus, a trial court's scope of review under the writ of certiorari does not involve an inquiry into the intrinsic correctness of the decision reached by the tribunal below, but only the manner in which the decision was reached. *Hall v. McLesky*, 83 S.W.3d at 752, 757 (Tenn. Ct. App. 2001).

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[4](...continued)
A current wrecker permit issued by the commission . . . shall be prominently and conspicuously displayed at all times in the wrecker of the licensee for which it was issued

[5]Metro Code § 6.80.550(G) provides in pertinent part as follows:

G. All licensees, who engage in the business of towing . . . shall post a notice on each vehicle . . . as follows:

"FEE TO DROP VEHICLE BEFORE DEPARTING; $35.00"

II. GROUNDS RAISED ON APPEAL

A. Inadequate Record

City Towing correctly argues that under Tenn. Code Ann. § 27-9-109(a) the Commission was required to provide the trial court with a complete record of its proceedings. *City of Brentwood v. Metropolitan Board of Zoning Appeals*, 149 S.W.3d 49, 54 (Tenn. Ct. App. 2004). According to City Towing, the transcript of the three hearings contain both inaudible responses and comments by unidentified people. Consequently, City Towing argues that the record of the proceedings before the Commission was inadequate to determine whether the Commission acted in an arbitrary or capricious manner.

The trial court found the record adequate for review of the Commission's revocation decision, and we agree. First, the record regarding the first two proceedings in September and October of 2005, wherein City Towing was placed on probation, is irrelevant to this appeal because those actions by the Commission are not challenged and the record is clear as to the Commission's decision.

As for the record of the proceedings before the Commission leading to the revocation decision in January of 2006, we agree with the trial court that while the record is imperfect, its imperfections have no bearing on this appeal. First, City Towing does not argue that the Commission committed any error in finding City Towing in violation of the Metro Code for failing to display its current wrecker permit or legally mandated drop fee. The alleged substantive error argued by City Towing on appeal concerns legal questions, not the violations themselves which were undisputed before the Board or anytime thereafter.

Second, as discussed by the trial court, the Commission's minutes of the decision in question appear complete, a finding that is not disputed by City Towing. The trial court's finding about the record is affirmed.

B. Commission's Application of the Termination Warning Given in the Probation Proceedings

According to City Towing, the offenses it admittedly committed were not "similar offenses" so as to trigger revocation under the prior probation conditions. The prior violations concerned failure to notify the police of a non-consent tow. Since the offenses were not similar, City Towing argues, the license revocation was arbitrary and capricious, thus requiring that the Commission's revocation decision be overturned.

The trial court's ruling on this issue we believe to be correct and succinct:

> This argument misses the point and is irrelevant. Revocation of City Towing's license was for failing to display a current permit as well as a "drop fee" notice on

the vehicle. In determining the sanction (i.e., revocation) the Commission was well within its authority to consider all of the petitioner's prior offenses, including those for which he was on probation. The January 2006 proceeding was not technically a hearing to consider probation revocation - it was a hearing for consideration of the newly charged offenses.

Alternatively, the Court would still reject this argument. First, this "similar offenses" language is found only in the Commission's minutes and is not included in the orders it later entered.* Furthermore, the Court believes these latter offenses are plainly "similar" in that they are regulations of wrecker services. Finally, the Court believes that, at least in this context, the Commission's interpretation of its own prior actions, like an agency's interpretation of its own regulations, should be entitled to deference so long as its construction is reasonable and not plainly erroneous or inconsistent. Cf., *e.g.*, Exxon Corp. v. Metropolitan Gov't of Nashville & Davidson County, 72 S.W.3d 638, 641 (Tenn. 2002); Gay v. City of Somerville, 878 S.W.2d 124, 127 (Tenn. Ct. App. 1994); cf. also Cathedral Candle Co. v. U.S. Int'l Trade Com'n, 400 F.3d 1352, 1363-64 (Fed. Cir. 2005). Accordingly, this argument also fails.

> *The language in the minutes for both the Redding and Jordan complaints reads: " . . . on probation for sixty days; and, if similar offenses occur during the sixty-day period, to consider revocation of their [*sic*] license."

We agree with and adopt the trial court's reasoning.

C. Was Revocation Disproportionate?

City Towing argues that the trial court erred when it found the Commission's decision to revoke City Towing's license was disproportionate as to be arbitrary and capricious. Essentially, City Towing argues that revoking its license for failure to comply with the Metro Code about notice of its permit and drop fee should "shock" the sense of justice and fairness of this Court. We harken back to the trial court's ruling regarding the Commission's ability to take prior offenses into consideration.

Further, when courts review only a remedy or sanction that is imposed by an agency,

> . . . we have noted that '[t]he appropriate remedy is particularly within the discretion of the [agency].' *McClellan v. Bd. of Regents of State Univ.*, 921 S.W.2d 684, 693 (Tenn. 1996). As a result, we will only review whether the remedy is 'unwarranted in law' or 'without justification in fact.' *Mosley v. Tenn. Dep't of Commerce & Ins.*, 167 S.W.3d 308, 321 (Tenn. Ct. App. 2004) (quoting *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-86, 93 S. Ct. 1455, 36 L.Ed2d 142 (1973)).

Robertson v. Tenn. Bd. of Social Worker Certification, 227 S.W.3d 7, 13-14 (Tenn. 2007).

Courts are not to substitute their judgment as to an appropriate sanction for that of the agency responsible for enforcement. *Id*. at 16. Based on the record before us, we cannot conclude that the revocation of City Towing's license was so disproportionate as to be arbitrary or capricious. Nor can we find that it is either unwarranted in law or without justification in fact.

Consequently, the trial court is affirmed.

III. FEDERAL PREEMPTION

Finally, City Towing argues that the Commission may not revoke its license based upon federal preemption. It is beyond dispute that if a municipal law conflicts with a federal statute, the Supremacy Clause of the United States Constitution causes the municipal law to be preempted and of no effect. *See City of Columbus v. Ours Garage and Wrecker Service*, 536 U.S. 424, 431-33 (2002). The authority of local governments to regulate the towing business has been somewhat limited by 49 U.S.C. § 14501(c), which provides in pertinent part as follows:

> (c)(1) General Rule. Except as provided in paragraphs (2) and (3), a State, [or] a political subdivision of a State . . . may not enact or enforce a . . . regulation . . . having the force and effect of law related to a price, route or service of any motor carrier . . . with respect to the transportation of property.
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> (2) Matters not covered. Paragraph (1)
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> > (A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls . . . or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility . . .
> >
> > (C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

City Towing argues that two of the regulations it admittedly violated were preempted by federal law since they did not fall within the statutory exceptions to preemption under 49 U.S.C. § 14501(c). First, City Towing argues that the Commission cannot enforce Metro Code § 6.80.175 requiring a call to the police within one (1) hour of a tow since it does not fall within one of the exceptions listed above. It is unclear whether this requirement is related to safety, but we need not reach that issue since City Towing's violations of that provision were part of a previous proceeding whose outcome was not appealed and is not at issue before this court.

Second, City Towing argues that Metro Code § 6.08.230(c), requiring the wrecker to display its wrecker permit, is preempted by federal law as it is unrelated to safety.[6] It is conceded by City Towing that *requiring* a wrecker permit is related to safety, but City Towing argues that its display is not. We agree with the trial court's reasoning that the permit display is safety related:

> The Court likewise concludes that the Code provision requiring each wrecker to display a current wrecker vehicle permit serves a genuine and legitimate interest in public safety and is therefore valid under 49 U.S.C. § 14501(c)(2)(A). Standing alone, a fee payable at fixed intervals as a prerequisite for engaging in a certain activity might at first seem more like a revenue-generating measure than a public safety regulation. That is apparently not what Metro has established, however. While M.C.L. § 6.80.230 speaks of a yearly permit renewal fee of $35, this is only part of the system that the Code establishes for the regulation of individual wreckers. . . . M.C.L. § 6.80.420, . . . sets out a scheme for safety inspections of individual wreckers to be conducted every six months. *See* M.C.L. § 6.80.420(B). The renewal of permits for individual wreckers is what allows the Commission to identify which vehicles need to be inspected. This is a reasonable measure. Absent the permit system, the Metropolitan Government would have no way of keeping up with the (required) periodic inspection of wreckers, and "outlaw" wreckers could more easily avoid safety inspections. The permit system is thus directly related to safety.

City Towing concedes that the Commission's finding that it failed to display the "drop fee - notice" under Metro Code § 6.80.550(G) concerns the price of a non-consented tow and is not preempted.

For the foregoing reasons, the decision of the trial court is affirmed. Cost of this appeal are taxed against City Towing, for which execution may issue if necessary.

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PATRICIA J. COTTRELL, P.J., M.S.

[6] We note 49 U.S.C. § 14501(c)(2) applies by its express terms only to "safety regulatory authority of a State" and not local government. The Supreme Court in *City of Columbus* found that the safety exclusion to preemption applies to state and local safety regulations. *City of Columbus*, 536 U.S. at 442.